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IN THE

Supreme Court of the United States

October Term, 1964.

No. 1068.

I-T-E CIRCUIT BREAKER COMPANY,
Petitioner,

v.

CITY OF PHILADELPHIA, et al.,

and

HONORABLE JOSEPH S. LORD, III, District Judge,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Reply Brief for Petitioner.

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REPLY BRIEF FOR PETITIONER.

Respondents' brief in opposition does not meet the issue presented by the petitioner. Respondents have not dealt with and apparently do not dispute petitioner's contention that § 1404(a) of the Judicial Code, 28 U. S. C., authorizes transfer only "for the convenience of parties and witnesses" and not merely upon a finding that "the interest of justice" will be served. Instead, respondents have assumed the burden of justifying the transfers under traditional standards, a burden which the district judge did not even attempt to carry.

Respondents' brief states at page 5 that:

> ". . . petitioner's complaint is only that it disagrees with the conclusion reached by the District Court after the hearing at which the opposing views were presented and it seeks to have this Court substitute its judgment . . . for the discretionary action taken by the District Court Judge. . . ."

This statement misrepresents the petitioner's position. Petitioner's complaint is that the district judge ignored the basic requirement of 28 U. S. C. § 1404(a) that a transfer shall be "for the convenience of parties and witnesses"; and that the essential facts properly before him did not furnish a legal basis for the exercise of discretion within the area authorized by the statute. See pages 7 to 9 of the petition. Nor does petitioner contend, as respondents suggest (respondents' brief, p. 5), that the district court must "parrot by rote" the statutory language. The district court must demonstrate that there is a legal basis for exercising its authority to depart from its conventional obligation to dispose of its own cases. As the Court said in *Continental Grain Co. v. Barge FBL-585,* 364 U. S. 19, 26, "the trial judge can, *after findings,* transfer the whole action to the more convenient court." (Emphasis supplied.)

An assertion by counsel, contrary to the only factual data in the record, that "some of the parties to the action contend that they, the witnesses and the courts will be convenienced by such an order" (see respondents' brief, p. 6) is not sufficient to support an order of transfer. The absence of statutory or other proper authority for a transfer makes its attempt such an abuse of judicial power as this Court has held to be a proper subject of immediate correction.

A fundamental premise of the respondents' argument is that "precisely the same issues" are involved in the Philadelphia cases as in the cases pending in Chicago

(respondents' brief, p. 6). This simply is not so. The facts relating to the existence and conduct of the alleged conspiracy may be more or less similar for the various purchasers who claim to have been injured by the conspiracy, but there can be no liability to a particular purchaser unless it can demonstrate that the alleged conspiracy had some impact upon it. This issue, as well as issues relating to the damages suffered, if any, depend on each purchaser's peculiar circumstances, its particular relationship with the defendant and the facts surrounding its specific purchases. Thus the issues involved in the Chicago cases relate to the particular circumstances of the purchasers who have sued in Chicago, whereas the issues involved in the Philadelphia cases relate to the particular circumstances of the purchasers who have sued there.

The coordinated pre-trial procedures instituted under the guidance of the Coordinating Committee for Multiple Litigation recognized for purposes of discovery the distinction between the conduct of the alleged conspiracy and the consequences of the alleged conspiracy for individual plaintiffs. Thus, consideration of separate transactions and specific damage questions inherent in the present stages of the litigation was excluded from the coordinated national discovery program. Such matters were treated as "local" and not susceptible of mass development. They cannot, as a practical matter, be consolidated, and attempting to do so for transactions which occurred in far distant localities, and which were handled by quite different people for wholly unrelated purchasers, cannot fail to add greatly to the confusion, expense and difficulty of disposing of the cases, both in the present pre-trial and in the trial stages. Indeed, this was undoubtedly a reason why, throughout the "national program," the Coordinating Committee always said it was advisory and the several jurisdictions in which the individual cases were pending were left with the separate responsibility for ultimately disposing of the cases pending before them.

Respondents have referred (respondents' brief, p. 3, n. 2) to a statement made by the Court of Appeals for the Eighth Circuit in *I-T-E Circuit Breaker Co. v. Becker*, 1965 Trade Cases ¶ 71,406, to the effect that what petitioner ". . . seemingly wants done is simply to have all the suits against it left alone." This is incorrect. Petitioner does not ask that its suits be ignored, but merely that they be disposed of according to law in the jurisdictions in which they were brought. Under the law, these cases should remain in the jurisdictions originally selected by the plaintiffs, where by far the largest part of the transactions involved have occurred, where necessary witnesses are subject to subpoena and where preparation and trial of the several cases can be conducted most conveniently, economically and expeditiously.

Section 1404(a), the decisions applying it, and its legislative history, make it clear that convenience of parties and witnesses is fundamental to the exercise of the authority granted by the statute. A district court is not authorized to relieve itself of its own statutory obligation to try cases brought before it by transferring such cases to other remote jurisdictions by the simple expedient of announcing that such a transfer is "in the interest of justice." Such a novel departure by a district court from established law should not be sanctioned without a full consideration by this Court. Petitioner therefore requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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